

**MAY 02 2006**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re:	)	BAP No.	SC-05-1338-TBMo
	)		
PETER LYNN GAUGHEN,	)	Bk. No.	03-00010-JH12
	)		
Debtor.	)		
_____	)		
PETER LYNN GAUGHEN,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
SILVER MOUNTAIN CHRISTMAS	)		
TREES; NORTHWEST TREE SALES;	)		
ALPINE FARMS; DAVID L.	)		
SKELTON, Trustee,	)		
	)		
Appellees.	)		
_____	)		

Argued on March 23, 2006  
at Pasadena, California

Submitted on March 31, 2006

Filed - May 2, 2006

Appeal from the United States Bankruptcy Court  
for the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: TCHAIKOVSKY,<sup>2</sup> BRANDT and MONTALI, Bankruptcy Judges.

\_\_\_\_\_  
<sup>1</sup>This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup>Hon. Leslie Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Appellant Peter Lynn Gaughen ("Gaughen" or "Appellant") seeks  
2 reversal of the bankruptcy court's order declaring the claims of  
3 Alpine Farms ("Alpine") and Northwest Tree Sales ("Northwest")  
4 excepted from the discharge that he hopes to receive upon  
5 completion of his chapter 12 plan. For the reasons stated below,  
6 we REVERSE the portion of the order challenged.

7 **FACTS**

8 Between 1999 and 2001, Appellant commenced four cases under  
9 chapter 13 of the Bankruptcy Code.<sup>3</sup> On January 2, 2003, while the  
10 fourth chapter 13 case was still pending, Appellant filed a fifth  
11 petition, this time seeking relief under chapter 12 (the "chapter  
12 case"). A plan was confirmed on August 26, 2003 but has not  
13 yet been fully performed by Appellant. Thus, Appellant has not  
14 yet received a discharge. See 11 U.S.C. § 1228(a).

15 The schedules of assets and liabilities (the "Schedules")  
16 accompanying Appellant's chapter 12 petition listed only three  
17 creditors: i.e., Chase Manhattan Mortgage Corporation, Household  
18 Finance Corporation, and Maxflow Corporation (collectively  
19 referred to as the "Scheduled Creditors"). The Schedules did not  
20 list Alpine, Northwest or a third creditor, Silver Mountain  
21 Christmas Trees ("Silver") (collectively referred to as  
22 "Appellees"). The clerk of the bankruptcy court sent a "Notice of  
23 Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines" to  
24 the Scheduled Creditors.

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26 <sup>3</sup>Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

1 Subsequently, on March 11, 2003, Appellant amended the  
2 Schedules to add twenty-three creditors, including Appellees. The  
3 claims bar date was originally set for July 10, 2003 but was later  
4 extended to August 5, 2003. Appellees did not file proofs of  
5 claims in the chapter 12 case and did not object to confirmation  
6 of Appellant's chapter 12 plan.

7 On December 3, 2004, Silver placed a keeper in Appellant's  
8 business. Silver withdrew the keeper on the same day, after  
9 receiving a call from Appellant's bankruptcy attorney, David  
10 Britton ("Britton"), informing Silver of the chapter 12 case.  
11 According to Silver, this was the first notice it had received  
12 concerning the chapter 12 case. On January 21, 2005, Silver filed  
13 a motion to dismiss the chapter 12 case for lack of subject matter  
14 jurisdiction and as a fraud upon the court. Alternatively, Silver  
15 asked the bankruptcy court to except its claim from Appellant's  
16 discharge on the grounds that it had not received timely notice of  
17 the bankruptcy case.

18 The bankruptcy court conducted a preliminary hearing on  
19 Silver's motion on February 25, 2005. An evidentiary hearing was  
20 conducted on July 16, 2005. For the most part, direct testimony  
21 was submitted by declaration. However, the declarants were  
22 present at the hearing and were cross-examined. Appellant's  
23 principal witnesses were Britton's secretary and the attorney for  
24 Ford Motor Credit ("Ford"), a creditor added to Appellant's  
25 schedules at the same time as Appellees.<sup>4</sup> Silver's principal

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27 <sup>4</sup>Britton's secretary ("Vallone") testified that, prior to the  
28 claims bar date, she served Appellees with notice of the amended  
schedules, naming them as creditors. Copies of the documents were  
admitted into evidence. Vallone testified that none of the  
documents in question were returned as undeliverable. Ford's

(continued...)

1 witnesses were its owners, James and Shirley Heater (the  
2 "Heaters"), Northwest's president, Grady Euteneier ("Euteneier"),  
3 and Alpine's chief executive officer, Gred Reid ("Reid").<sup>5</sup>

4 The bankruptcy court ultimately found that Silver had  
5 presented clear and convincing evidence of not having received  
6 timely notice of the bankruptcy case. As a result, the court  
7 granted Silver's motion to declare its debt excepted from  
8 Appellant's discharge. Silver's attorney then asked the court to  
9 extend this ruling to Northwest and Alpine.

10 Although the court initially expressed some reluctance to  
11 extend the ruling to Northwest and Alpine, given the fact that  
12 only Silver had filed the motion seeking this relief, Silver's  
13 counsel ultimately persuaded the court to do so. Silver argued  
14 that Appellant had received sufficient due process with respect to  
15 this relief because it knew that witnesses on behalf of Northwest  
16 and Alpine would testify at the hearing that they had not received  
17 timely notice of the chapter 12 case either. The bankruptcy court  
18 noted that requiring Alpine and Northwest to file their own

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19  
20 <sup>4</sup>(...continued)

21 attorney ("Herron") testified that he had received notice of the  
22 claims bar date prior to its expiration and had filed a timely  
23 proof of claim. He stated that he believed he had received  
written notice of the claims bar date through the mail.

24 <sup>5</sup>All of Silver's witnesses testified that their businesses  
were owed money by Appellant. Silver's and Northwest's claims had  
25 been reduced to judgment. All of Silver's witnesses testified  
26 that they had not received written notice of Appellant's chapter  
12 case or of the amended schedules, naming them as creditors.  
27 The Heaters and Reid testified that they first learned of the  
chapter 12 case through a telephone call from Silver's attorney,  
28 Fred James ("James") in December 2004. Euteneier testified that  
he first learned of the chapter 12 case when he received notice of  
Britton's application for attorneys' fees in the same month.

1 motions would serve no purpose because the hearing on the motions  
2 would simply be a "repeat performance of the same evidence."  
3 Appellant filed a timely notice of appeal from the court's ruling  
4 with respect to Northwest and Alpine.<sup>6</sup>

#### 5 **ISSUES**

6 1. Did the bankruptcy court abuse its discretion or deny  
7 Appellant's due process rights by declaring Alpine's and  
8 Northwest's claims excepted from Appellant's chapter 12 discharge  
9 when neither creditor had filed a motion or adversary proceeding,  
10 requesting such relief?

11 2. If not, did the bankruptcy court clearly err in finding  
12 that Alpine and Northwest did not receive timely notice of  
13 Appellant's chapter 12 case?

#### 14 **STANDARD OF REVIEW**

15 On appeal, findings of fact are reviewed for clear error.  
16 In re Fowler, 394 F.3d 1208, 1212 (9th Cir. 2005). Conclusions of

17  
18 <sup>6</sup>While Appellant's Notice of Appeal named as appellees the  
19 chapter 12 trustee and all three Appellees (Silver, Northwest and  
20 Alpine), Appellant's opening brief did not challenge the court's  
21 ruling as to Silver. Further, Alpine and Northwest asserted both  
22 in their responsive brief and at oral argument that Appellant has  
not challenged the bankruptcy court's ruling with respect to  
Silver, and Appellant did not attempt to counter this assertion  
either by way of a reply brief or at oral argument. Consequently,  
Appellant has waived any challenge to the court's ruling with  
respect to Silver.

23 Alpine and Northwest also noted in their brief that, during  
24 the pendency of the appeal, Appellant had filed a new chapter 13  
25 case. At the hearing, the Panel questioned whether relief from  
26 the automatic stay in this new case had been obtained to permit  
27 the appeal to proceed. See Ingersoll-Rand Financial Corp. v.  
28 Miller Mining Co., Inc., 817 F.2d 1424, 1426 (9<sup>th</sup> Cir. 1987). Upon  
learning that it had not, the Panel permitted argument to be  
presented but deferred taking the appeal under submission pending  
relief from stay being obtained. The parties subsequently  
stipulated to relief, and the bankruptcy court approved the  
stipulation.

1 law are reviewed de novo. In re Wolfberg, 255 B.R. 879, 881 (9th  
2 Cir. BAP 2000). Assertions of due process violations are reviewed  
3 de novo. In re Victoria Station, 875 F.2d 1380, 1382 (9th Cir.  
4 1989).

#### 5 **DISCUSSION**

6 As noted above, Appellant identified two issues on appeal.  
7 First, he contended that the bankruptcy court abused its  
8 discretion and/or denied him his constitutional due process rights  
9 given the absence of any motion or adversary proceeding requesting  
10 the relief granted. Second, he contended that the bankruptcy  
11 court made a clearly erroneous factual finding by concluding that  
12 Northwest and Alpine had not received timely notice of the chapter  
13 12 case.

14 Because we agree with Appellant's first contention, we need  
15 not reach the second issue. We conclude that the bankruptcy  
16 court abused its discretion and denied Appellant his due process  
17 rights under the United States Constitution by declaring  
18 Northwest's and Alpine's claims excepted from his chapter 12  
19 discharge in the absence of prior notice.

20 Appellees argue that Appellant's due process rights have been  
21 satisfied because, as the bankruptcy court found, Appellant was on  
22 notice that Northwest and Alpine would be present at the  
23 evidentiary hearing and would testify that they had not received  
24 timely notice. Their declarations were filed six months prior to  
25 the hearing. Appellant had the opportunity to cross-examine them  
26 and in fact did so. Appellees further argue that the bankruptcy  
27 court's ruling promoted judicial economy. As the court stated,  
28 requiring Northwest and Alpine to file their own motions would

1 have resulted in a repeat performance, with the same evidence  
2 being presented at the subsequent hearing. While we recognize the  
3 practicality of this approach, we are unable to find that it  
4 complies with a party's constitutional due process rights.

5 "It is fundamental that due process of law requires 'notice  
6 reasonably calculated, under all circumstances, to apprise  
7 interested parties of the pendency of the action and afford them  
8 an opportunity to present their objections.'" United States v.  
9 Levoy, 182 B.R. 827, 833 (9<sup>th</sup> Cir. BAP 1995) (quoting Mullane v.  
10 Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Here,  
11 Appellant did not receive notice reasonably calculated, under all  
12 circumstances, to apprise him that relief was being sought with  
13 respect to Northwest and Alpine as well as with respect to Silver.  
14 He received no advance notice that this relief would be requested.  
15 Silver made the request on behalf of Northwest and Alpine with no  
16 prior warning, after the bankruptcy court made its ruling with  
17 respect to Silver.

18 Under Rule 7001, the determination of whether a debt is  
19 dischargeable must normally be made through an adversary  
20 proceeding. Fed. R. Bankr. Proc. 7001(6). An adversary  
21 proceeding requires the filing of a complaint and the service of a  
22 summons. Fed. R. Bankr. Proc. 7003 & 7004. Here, the court  
23 permitted the determination to be made in the context of a motion.  
24 A motion procedure typically provides less notice than an  
25 adversary proceeding. In re Loloe, 241 B.R. 655, 660 (9th Cir.  
26 BAP 1999). Arguably, this was error even with respect to Silver.

27 In Loloe, we held that a bankruptcy court erred by  
28 purporting to resolve a lien priority dispute in the context of a

1 motion to sell real property free and clear of liens rather than  
2 through an adversary proceeding. 241 B.R. at 657. In addition,  
3 we noted that the notice of motion had not even been served in the  
4 manner prescribed by the local bankruptcy rules, which required  
5 personal service given the shortened notice period. 241 B.R. at  
6 658. We also noted that the bankruptcy court signed "the order  
7 without a hearing, on the day before the scheduled hearing,  
8 without making any independent determination, and without making  
9 findings of fact and conclusions of law." Id. We reversed,  
10 stating that "due process...cannot be circumvented by sneaking the  
11 issue [of a lien priority dispute] into a motion to sell property  
12 free and clear of liens...." 241 B.R. at 659.

13 Here, the denial of due process was even more evident. There  
14 was no advance notice given to the Appellant that a request would  
15 be made in the context of Silver's motion to except the claims of  
16 Alpine and Northwest from Appellant's discharge. As we stated in  
17 Loloee:

18 Parties are entitled to presume that the court  
19 will comply with applicable rules of procedure  
20 and that they will receive the notice that is  
usually required.

21 ...[T]he greater the deviation from prescribed  
22 procedure, the greater the quality and amount  
of notice needed in order to comply with due  
process.

23 One, then, must compare the notice that was  
24 actually given with the notice that would have  
25 been given if the rules of procedure had been  
26 followed. Whether the difference is enough to  
flunk basic due process requirements is, in  
the end, a matter of degree.

27 Loloee, 241 B.R. at 662.

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1 In Loloee, we found the deviation from the prescribed  
2 procedure sufficiently great to compel the conclusion that the  
3 lienholder's due process rights had been violated. Even more so,  
4 that conclusion is compelled by the facts presented in this case.

5 Moreover, the bankruptcy court could not fairly conclude that  
6 it would serve no practical purpose to require Northwest and  
7 Alpine to file their own proceedings seeking to except their  
8 claims from Appellant's discharge. Silver's claim was only for  
9 approximately \$15,000. Alpine's claim was for approximately  
10 \$12,000, and Northwest's was for approximately \$40,000.<sup>7</sup> Had  
11 Appellant known that the dischargeability of Alpine's and  
12 Northwest's claims were also at stake, he might have employed a  
13 different litigation strategy. Under the circumstances, in  
14 keeping with our ruling in Loloee, we find that due process  
15 requirements were not satisfied when the bankruptcy court held  
16 that Alpine's and Northwest's claims were excepted from  
17 Appellant's discharge in the absence of any pending motion or  
18 adversary proceeding requesting such relief. Denial of a party's  
19 due process rights necessarily constitutes an abuse of discretion.  
20 Therefore, on both grounds, the appeal should be granted, and the  
21 bankruptcy court's order reversed.

#### 22 CONCLUSION

23 The bankruptcy court's order with respect to Alpine and  
24 Northwest is REVERSED because Appellant did not receive sufficient  
25 notice to satisfy procedural due process and because the  
26 bankruptcy court abused its discretion by granting relief as to

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28 <sup>7</sup>The claim amounts for Alpine and Northwest are based on the  
undisputed representations of counsel made at oral argument.

1 these two creditors in the absence of a pending proceeding  
2 requesting such relief. As a consequence, we do not reach the  
3 merits of whether the bankruptcy court erred by finding that  
4 Alpine and Northwest did not receive timely notice of the chapter  
5 12 case and that, therefore, their claims should be excepted from  
6 Appellant's discharge.

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